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Disability discrimination in the workplace

An employer's guide

Kate Russell, BA, barrister, MA

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Disability discrimination in the workplace: An employer's guide
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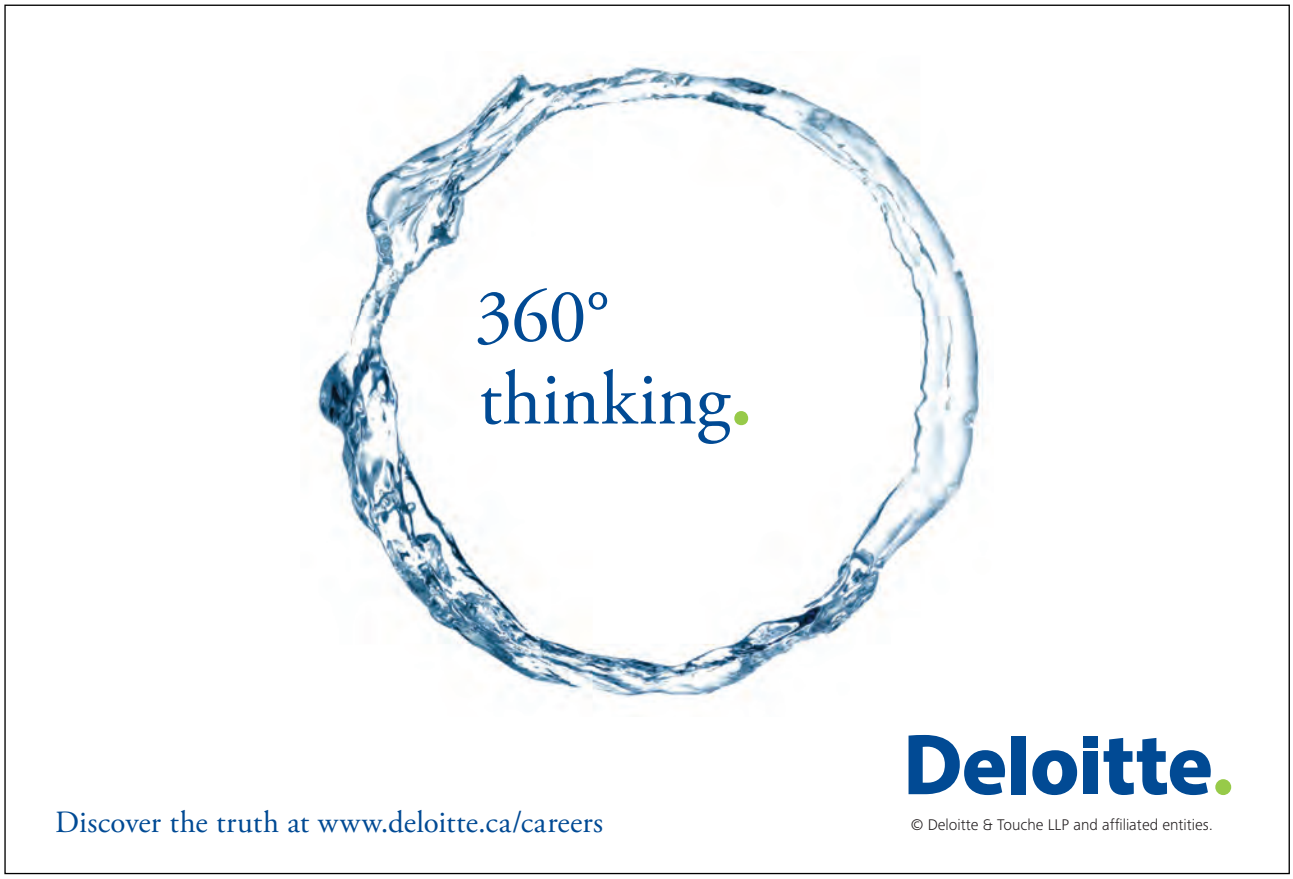

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Preface

The Disability Discrimination Act (DDA) of 1995, which has now largely been replaced by the Equality Act 2010, aims to stop discrimination against people with disabilities. This means employers have to comply with regulations to make reasonable adjustments if their employment arrangements place disabled people at a substantial disadvantage compared with non-disabled people.

This book has been written with the intention of helping employers to accommodate the requirements of employees who, but for their disability, would be able to do the job satisfactorily. It also helps you to reduce the risk of disability discrimination claims.

Recent statistics suggest that around one in five people of working age are considered to be 'disabled' within the meaning of the DDA, and since the introduction of the Equality Act 2010, rights have been extended and strengthened.

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About the author

Kate Russell, BA, barrister, MA is the Managing Director of Russell HR Consulting and the author of this publication. As Metro's HR columnist, she became known to thousands, with her brand of down-to-earth, tactical HR. Kate is a regular guest on Five Live and her articles and opinions have been sought by publications as diverse as The Sunday Times, Real Business and The Washington Post, as well as every major British HR magazine and her HR blog has been rated third best in the UK. She is the author of several practical employment handbooks and e-books, the highly acclaimed audio update service Law on the Move, as well as a monthly e-newsletter, the latter document neatly combining the useful, topical and the frivolous.

Russell HR Consulting Ltd delivers HR solutions and practical employment law training to a wide variety of industries and occupations across the UK. Our team of skilled and experienced HR professionals has developed a reputation for being knowledgeable, robust and commercially aware. We are especially well versed in the tackling and resolving of tough discipline and grievance matters.

We also specialise in delivering employment law training to line managers, business owners and HR professionals, both as in-house, tailor made workshops or open courses. We provide a wide range of practical employment training, enabling new and experienced managers to ensure that they work in a compliant and ethical fashion, and gain optimum employee output.

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Miscellaneous notes

Statutory limits

Today's statutory limits have not been specified in this book as they go out of date so quickly. You can email pm@russellhrconsulting.co.uk for an up-to-date copy of statutory limits.

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Disclaimer

Whilst every effort has been made to ensure that the contents of the book are accurate and up to date, no responsibility will be accepted for any inaccuracies found.

This book should not be taken as a definitive guide or as a stand-alone document on all aspects of employment law. You should therefore seek legal advice where appropriate.

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Gender description

For convenience and brevity I have referred to 'he' and 'him' throughout the book. It is intended to refer to both male and female employees.

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1 Overview of the Ebook

1.1 Introduction

Under the Disability Discrimination Act 1995, now subsumed into the Equality Act 2010 (EqA), it is unlawful for an employer to discriminate against a disabled person in relation to his employment.

Employers may have to make reasonable adjustments if their employment arrangements place disabled people at a substantial disadvantage compared with non-disabled people. Failure to do so can lead to complaints to the tribunal.

The EqA also provides rights for people not to be directly discriminated against or harassed because they have an association with a disabled person. This can apply to a carer or parent of a disabled person. In addition, people must not be directly discriminated against or harassed because they are wrongly perceived to be disabled.

1.2 The meaning of disability

According to official figures, around one in five people of working age are considered to be 'disabled' within the meaning of the law.

A person has a disability if he has 'a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day-to-day activities'. It is very broadly interpreted and in this chapter we consider what this means.

There are also a number of illnesses which while undoubtedly illnesses, are exceptions to the general rule.

1.3 Effects of treatment and medication

Where the disabled person is having treatment, you must consider what effect the impairment would have on the employee if he was not being treated (you'll probably need medical advice to determine this). The treatment or correction measures which are to be disregarded encompass medical interventions, including counselling and the use of a prosthesis or other aids.

1.4 Rights and remedies

In addition to the right not to suffer discrimination because of their disability, the EqA also provides rights for employees not to be directly discriminated against or harassed because they have an association with a disabled person. This can apply to a carer or parent of a disabled person. In addition, people must not be directly discriminated against or harassed because they are perceived, albeit wrongly, to be disabled.

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1.5 Discrimination in employment

It is unlawful for an employer to discriminate against a disabled person in relation to his employment. Before 1995, it was almost always the case that a disabled employees was registered disabled by a doctor. Employers with 20 or more staff were expected to have a disabled quota of three per cent of their workforce. Few employers complied, because the code was purely voluntary. It was rarely enforced and provided little protection for disabled people. The advent of the DDA clarified, extended and strengthened rights for disabled people.

1.6 Collecting medical data

The EqA introduced changes which mean that in most cases employers cannot ask applicants to complete a medical questionnaire or undergo a medical examination at an early stage of the recruitment process. Unless the case falls into a specific exemption, no assessment of a prospective employee's health or fitness can take place until a job offer has been made.

1.7 Reasonable adjustments

As an employer, you are under a specific duty to make reasonable adjustments to accommodate the needs of a disabled employee. A reasonable adjustment is any step or steps that you can reasonably take to enable a disabled employee to carry out his duties and ensure that existing workplace arrangements don't put the disabled person at a disadvantage in comparison with a non-disabled person.

1.8 Defence

The legislation means that an employer cannot treat a disabled employee in a way which, because of the employee's disability, is to his detriment and which cannot be objectively justified. The employer has a defence if he can show that he did not know and could not reasonably be expected to know that the employee had a disability.

1.9 Tips to avoid disability discrimination

There may be several ways to avoid discrimination in any one situation. This chapter looks at some examples.

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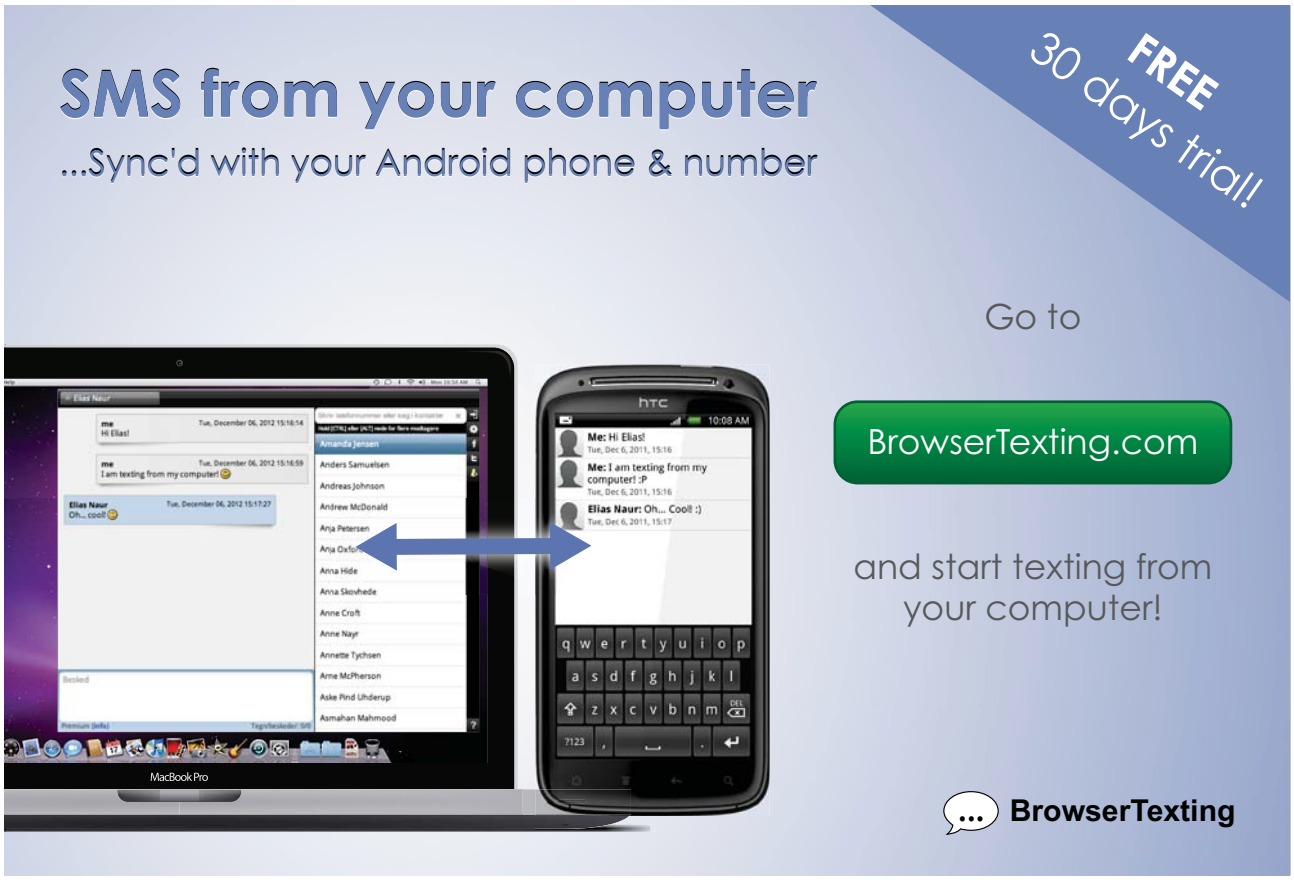
2 The meaning of disability

2.1 Introduction

It is unlawful for an employer to discriminate against a disabled person in relation to his employment. Before 1995, disabled employees had to be registered disabled by a doctor and employers with 20 or more staff were supposed to have a disabled quota of three per cent of their workforce. Few employers complied, because the code was purely voluntary. It was rarely enforced and provided little protection for disabled people.

The Disability Discrimination Act (DDA) came into force in 1995, and the rights of disabled people were significantly strengthened and extended in the fields of employment, education, transport, the provision of goods, facilities, services, premises and the exercise of public functions.

The Equality Act 2010 (EqA), which came into force on 1st October 2010, has revised the definition of disability making it easier for a person to demonstrate that he has a disability. Only those people who are defined as disabled or associated with a disabled person ('associative discrimination') in accordance with the statutory definition are entitled to the protection that the Act provides. This topic concentrates on protection in employment.



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2.2 Definition

According to the Act, a person has a disability if he has a 'physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day-to-day activities'.

- For the purposes of the Act, these words have the following meanings.
- 'Substantial' means more than minor or trivial.
- 'Long-term' means that the effect of the impairment has lasted or is likely to last for at least twelve months (there are special rules covering recurring or fluctuating conditions).
- 'Normal day-to-day activities' include everyday things like eating, washing, walking and going shopping.

People who have had a past disability that meets this definition are also protected by the Act.

As a general rule, the courts tend to interpret the definition of disability very broadly and will be prepared to agree that an employee is disabled where the elements set out above are alleged, even where there has been no firm diagnosis. If in doubt, it's always best to err on the side of caution and work on the basis that the employee is disabled.

2.3 Physical impairments

In order to fall within the definition of disabled, a person must have a physical or mental impairment. In many cases, there will be no dispute about the existence of an impairment and any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the statutory definition. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with issues about its effects.

Impairment is interpreted very broadly and includes damage, defect, disorder or disease.

Whether a person is disabled for the purposes of the EqA is generally determined by reference to the effect that the impairment has on that person's ability to carry out normal day-to-day activities.

Most illnesses and conditions are capable of being disabilities within the meaning of the statutory definition. Whether they are found to be so by the court will depend on the circumstances. Only a few will automatically be considered to be disabilities. These include HIV, cancer, multiple sclerosis, loss of limbs, registered blindness and visible scarring or blemishes (other than those which are elective, such as tattoos).

Those apart, it is not possible to provide an exhaustive list of conditions that qualify as impairments. A disability can arise from a wide range of impairments. Here are some examples.

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- Sensory impairments, such as those affecting sight or hearing.
- Impairments with fluctuating or recurring effects, such as rheumatoid arthritis, myalgic encephalitis (ME, also known as chronic fatigue syndrome), fibromyalgia, depression and epilepsy.
- Progressive impairments, such as motor neurone disease, muscular dystrophy, forms of dementia and lupus.
- Organ specific impairments, including respiratory conditions, such as asthma, and cardiovascular diseases, including thrombosis, stroke and heart disease.
- Developmental impairments, such as autistic spectrum disorders, dyslexia and dyspraxia.
- Learning difficulties.
- Mental health conditions and mental illnesses, such as depression, schizophrenia, eating disorders, bipolar affective disorders, obsessive compulsive disorders, as well as personality disorders and some self-harming behaviour.
- Impairments produced by injury to the body or brain.
- Club foot.
- Back injury (soft back tissue).
- Photosensitive epilepsy.
- Cerebral palsy.
- Multiple sclerosis.
- Diabetes.
- Migrainous neuralgia.

It may not always be possible to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish and there may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.

Causation of an impairment isn't relevant, even if the cause is a consequence of a condition which is excluded. For example, liver disease as a result of alcohol dependency would count as a relevant impairment, although alcoholism itself is expressly excluded from the scope of the statutory definition of disability. What it is important to consider is the effect of the impairment, provided that it is not an excluded condition.

2.4 Mental impairments

The scope surrounding the definition of a mental impairment is considered to be more wide reaching. The requirement that any mental illness must be 'clinically well recognised' was removed in 2005 after research found that people with severe mental illnesses may not have a clear diagnosis. However, anyone who has an impairment, including one resulting from a mental illness, will still need to meet the requirements of the definition as set out above, in order to demonstrate that he has a disability under the Act.

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'General learning difficulties' can amount to a disability for the purposes of the legislation, if they have an adverse effect on the employee's ability to carry out normal day-to-day activities. There is no absolute requirement that evidence of a disability must be provided by a doctor.

Example

Mr Dunham was employed by Ashford Windows Ltd as a fork-lift truck driver in September 2002. He was dismissed in December that year. He complained that the company's dismissal and failure to make reasonable adjustments amounted to disability discrimination.

The company argued Mr Dunham did not have a mental illness amounting to 'a mental impairment' and that it had done all it could, but that he was unable to do his job in a safe manner and he was therefore dismissed.

The court ruled that it was not necessary to establish a specific mental impairment or clinical condition for a person to suffer from a mental impairment within the Act and the case was remitted back to the employment tribunal to consider whether Mr Dunham's impairment had a substantial and adverse effect on his day-to-day activities.

Dunham v Ashford Windows [2005]

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Since the late 1990s, stress has become a major employment law issue. While many employers receive medical notes for 'stress', 'work stress', or 'anxiety', this does not necessarily mean that the individual fits the definition of disability set out in the Act. Stress itself is not an illness and does not automatically constitute a disability. However, depending on the symptoms, it is capable of being a disability; each case will turn on its own facts. In order for an individual to succeed in such a claim, he must show that the stress meets the requirements of the definition of a disability.

Example

Ms Hull was diagnosed as suffering from moderately severe agitated depression and hypertension. In the past year, she had been involved in a car accident, suffered two deaths and the end of a relationship. All this was heightened by ongoing work stress which left Ms Hull suffering from low moods, poor sleep and difficulty in coping with everyday tasks.

The tribunal accepted that Ms Hull suffered from a stress-related illness and that she was disabled for the purposes of the DDA.

Hull v Tamar Science Park [2008]

2.5 Progressive conditions

Special conditions apply to progressive conditions, such as systemic lupus erythematosus, various types of dementia, rheumatoid arthritis and motor neurone disease.

A person who has a progressive condition will be treated as having an impairment which has a substantial adverse effect from the moment any impairment resulting from that condition first has some adverse effect on his ability to carry out normal day-to-day activities, provided that in the future the adverse effect is more likely than not to become substantial. Obtaining a medical prognosis of the likely impact of the condition will be the normal route to establishing protection under this provision. The effect need not be continuous and need not be substantial. The person will still need to show that the impairment meets the requirements of 'long-term'.

A person with a progressive condition which has no effect on day-to-day activities because it is successfully treated (for example, by surgery) may still have a disability where the effects of that treatment give rise to a further impairment which does have an effect on normal day-to-day activities. For example, treatment for the condition may result in an impairment which has some effect on normal day-to-day activities and the effects of that impairment are likely to become substantial in the future.

A person with cancer, multiple sclerosis or HIV infection is deemed to be disabled from the point at which diagnosis was made, irrespective of whether the condition has yet had any impact upon him.

The definition of impairment is sufficiently flexible to include a condition which has come about as a result of medical treatment.

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Example

In October 1999, Mr Kirton was diagnosed as having prostate cancer. The surgery he underwent resulted in him suffering from urinary incontinence. Mr Kirton made a number of claims against his employer, which included a complaint of disability discrimination. The Tribunal concluded that Mr Kirton was not disabled because his condition did not have a substantial and long-term adverse effect upon his ability to carry out normal day-to-day activities. The Court also rejected Mr Kirton's submission that, in any event, he was to be taken to be a disabled person under the "progressive condition" provisions of the Disability Discrimination Act 1995 which states that "where a person has a progressive condition such as cancer…and as a result of that condition, he has an impairment" which has (or had) an effect on his ability to carry out normal day-to-day activities, but that effect is not (or was not) a substantial adverse effect, he shall be taken to have an impairment which has such substantial adverse effect if the condition is likely to result in his having such an impairment.

The case eventually came before the Court of Appeal which found that Mr Kirton was disabled within the meaning of the Act. The impairment of urinary incontinence was a result of the condition within the meaning of the statutory definition, notwithstanding that it was a result of the surgery he had undergone

Kirton v Tetrosyl Ltd [2003]

2.6 Substantial adverse effect

The adverse effect on normal day-to-day activities must be a substantial one. That is, the effect must be more than a condition which is considered to be minor or trivial.

In cases where it is not clear that the effect of an impairment is substantial, a number of factors should be considered. These include the time taken by the individual to carry out an activity and the way in which he carries it out. A comparison should be made with the time or manner expected of a person who does not have the impairment.

Factors to consider

2.6.1 Time to carry out an activity

The time taken by a person with an impairment to carry out a normal day-to-day activity should be considered when assessing whether the impairment's effect is substantial. Compare it with the time it might take a person who does not have the impairment to complete an activity.

Another factor to be considered is the way in which a person with that impairment carries out a normal day-to-day activity compared with the way that the person might be expected to carry out the activity if he does not have the impairment.

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2.6.2 Cumulative effects of the impairment

Taken in isolation, an impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity, but its effects on more than one activity, taken together, could result in an overall substantial adverse effect.

For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of activities, such as getting washed and dressed, preparing a meal, or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his ability to carry out these normal day-to-day activities.

2.6.3 Environmental factors

Environmental conditions may exacerbate the effect of an impairment. Factors such as temperature, humidity, lighting, the time of day or night, how tired the person is, or how much stress he is under, may have an impact on the effects. When assessing whether adverse effects are substantial, the extent to which such environmental factors are likely to exacerbate the effects should also be considered.

The focus here is on what the worker cannot do or can only do with difficulty. Just because the employee can carry out a number of day-to-day activities, this doesn't mean that he is not substantially affected.

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Example

Mr Goodwin was a paranoid schizophrenic. He coped adequately with living alone. However, his evidence was that he suffered from hallucinations, had difficulty concentrating and misinterpreted the words of his work colleagues in a paranoid way. In addition, he was unable to hold a normal conversation, behaved strangely at times and had significantly impaired concentration.

The EAT found that the symptoms of his illness impaired his ability to concentrate and communicate and that did affect his ability to carry out normal, day-to-day activities substantially.

Goodwin v Patent Office [1999]

2.6.4 Effects of behaviour

In deciding what is substantial, consider how far a person can reasonably be expected to modify his behaviour to prevent or reduce the effects of an impairment on normal day-to-day activities. If he can reasonably be expected to behave in such a way that the effect of the impairment doesn't have a substantial adverse effect on his ability to carry out normal day-to-day activities, he would no longer meet the definition of disability. For example, when considering modification of behaviour, it would be reasonable to expect a person who has back pain to avoid extreme activities, such as parachuting. It would not be reasonable to expect him to give up, or modify, more normal activities that might exacerbate the symptoms, such as moderate gardening, shopping, or using public transport.

You also have to take into account a situation where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment or avoids them because of a loss of energy and motivation. It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability, it is important to consider the things that a person cannot do, or can only do with difficulty, rather than focusing on those things that a person can do.

For example, a woman with a persistent stammer uses coping strategies to manage her condition, such as avoiding using the telephone, not giving verbal instructions at work, limiting social contact outside her immediate family, and avoiding challenging situations with service providers. It may not be readily obvious that she has an impairment which adversely affects her ability to carry out normal day-to-day activities.

In determining whether she meets the definition of disability, you should consider the extent to which it is reasonable to expect her to place such restrictions on her working and domestic life.

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2.7 Normal day-to-day activities

Before the implementation of the EqA, for an impairment to be considered to be a disability, it would have to adversely affect a number of capacities (mobility, manual dexterity, physical co-ordination, continence, ability to lift, carry or otherwise move everyday objects, speech, hearing or eyesight, memory or ability to concentrate, learn or understand and perception of the risk of physical danger).

These categories have now been removed. Employment tribunals now have to consider whether a person's impairment has a long term and substantial effect on his ability to carry out day-to-day activities. The guidance will mean that employees with an impairment are likely to find it easier to demonstrate that they have a disability.

Protection covered by the Act only protects employees whose ability to carry out 'normal day-to-day activities' is impaired. The term 'normal day-to-day activities' refers to tasks that are carried out by most men and women on a regular basis and includes examples such as walking, driving, typing and forming social relationships.

The phrase is not intended to include activities that are normal only for a particular person or small group of people, and in light of work-related activities, the guidance makes it clear that the term does not include work of any particular form because no particular form of work is 'normal' for most people. Following the case of Paterson v Commissioner of Police of the Metropolis in 2007, the definition can include irregular but predictable activities which occur in professional life.

Example

Mr Paterson was employed as a police officer in 1983. During the course of his career he was promoted and by 1999 he had reached the rank of Chief Inspector. In 2004, he discovered that he was dyslexic. He had previously produced complex reports and dealt with huge amounts of paperwork without realising he had dyslexia.

He made a claim of disability discrimination arguing that his employer had failed to make reasonable adjustments for him, particularly when undertaking a promotion assessment. Mr Paterson said he needed 25% extra time in order to complete the assessment. The employer acknowledged that some adjustments had been made but Mr Paterson argued that they were insufficient.

The Tribunal accepted that he suffered from dyslexia but considered that his condition did not impair his ability to undertake day-to-day activities. The employer argued that the promotion assessments were not to be considered a day-to-day activity because they were infrequent in nature. Whilst the Tribunal found that Mr Paterson was at a substantial disadvantage compared to his colleagues, it found that this disadvantage did not render him disabled and could simply be compensated for by good industrial practice.

The EAT disagreed, saying that taking high-pressure examinations for the purpose of promotion constituted a 'normal', if irregular, everyday activity. It concluded that Mr Paterson was at a disadvantage when sitting examinations and was thus disabled within the meaning of the DDA.

Paterson v Commissioner of Police of the Metropolis [2007]

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2.8 Long term effect

An impairment has to be 'long term' before it falls under the category of a disability. According to the Equality Act 2010, an impairment is 'long term' if it:

- has lasted for at least 12 months; or
- is likely to last for at least 12 months; or
- is likely to last for the rest of the individual's life.

The effects of an impairment don't have to be active all the time for the impairment to qualify as a disability. If the impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities, but that effect stops or is not always apparent, the substantial effect is regarded as continuing if it is likely to recur. In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred. Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term'.

The type of conditions with effects which can recur, or where effects can be sporadic, include: rheumatoid arthritis, Ménières disease and epilepsy, as well as mental health conditions, such as schizophrenia, bipolar affective disorder and certain types of depression. These are only examples and is not intended to be an exhaustive list. The regulations specifically exclude hay fever, except where it aggravates the effects of an existing condition.

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Some impairments with recurring or fluctuating effects may be less obvious in their impact on the individual concerned, but they will still be considered to be impairments.

If medical or other treatment is likely to permanently cure a condition and therefore remove the impairment, so that recurrence of its effects would then be unlikely even if there were no further treatment, consider this when looking at the likelihood of recurrence of those effects. However, if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stopped, as is the case with most medication, then the treatment is to be ignored and the effect is to be regarded as likely to recur.

In respect of past disabilities, if the individual has recovered or the condition has become less substantial, then its effects count as long-term if they lasted 12 months or more after the first occurrence, or if a recurrence happened or continued until more than 12 months after the first occurrence.

2.9 Conditions which are automatically disabilities

In 2005, the DDA amended the definition of disability to ensure that people with HIV, cancer and multiple sclerosis are covered by the Act from the point of diagnosis, rather than from the point when the condition begins to have an adverse effect on the person's day-to-day activities.

People with some visual impairments are automatically deemed to be disabled.

Severe disfigurements, such as visible skin disease, scars and birthmarks, limb or postural deformation, will usually be regarded as a disability. Not all disfigurements will be considered severe. Whether or not they are severe may depend partly on where they are on the body. For example, a birthmark on the back may not be a severe disfigurement, whereas a similar mark on the employee's face might be considered severe.

Disfigurements which consist of a tattoo (which has not been removed), non-medical body piercing, or something attached through such piercing, are not regarded as a disability.

2.10 Excepted conditions

Certain conditions are specifically excluded.

- Addiction to, or dependency on, alcohol, nicotine, or any other substance (other than in consequence of the substance being medically prescribed).
- Seasonal allergic rhinitis (for example, hay fever), except where it aggravates the effect of another condition.
- Tendency to set fires.
- Tendency to steal.
- Tendency to physical or sexual abuse of other persons.
- Exhibitionism.
- Voyeurism.

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A person with an excluded condition may nevertheless be protected as a disabled person if he has an accompanying impairment which meets the requirements of the definition. For example, a person who is addicted to a substance such as alcohol may also have depression or a physical impairment, such as liver damage, arising from the alcohol addiction. While this person would not meet the definition simply on the basis of having an addiction, he may still meet the definition as a result of the effects of the depression or the liver damage.

Example

Ms Power was an alcoholic. She was diagnosed as suffering with depression. She was signed off sick for over one year and was eventually dismissed. She complained unsuccessfully in the first instance of disability discrimination.

There had been some debate between the parties as to whether the alcoholism was the cause or a symptom of the depression. On appeal, the EAT held that the cause of the depression was not material when deciding whether or not someone was disabled within the meaning of the DDA. The correct approach was to look at whether the impairment fell within the definition of 'disability' under the DDA and then look at whether the condition fell within one of the exclusions.

Power v Panasonic [2003]

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3 Effects of treatment and medication

3.1 Introduction

Where the disabled person is having treatment or correction, you must consider what effect the impairment would have on the employee if he was not being treated (you'll probably need medical advice to determine this). The treatment or correction measures which are to be disregarded encompass medical treatment, including counselling and the use of a prosthesis or other aid.

3.2 Treatment and medication

This rule applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing, it may be having the effect of masking a disability so that the latter does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, you should disregard the medical treatment.

For example, in the case of someone with diabetes which is being controlled by medication or diet, or the case of a person with depression which is being treated by counselling, whether or not the effect is substantial should be decided by reference to what the effects of the condition would be if he were not taking that medication or following the required diet, or were not receiving counselling (the so-called 'deduced effects').

You must also take account of the effect of the continuing medical treatment where it creates a permanent, rather than a temporary, improvement.

3.3 Exceptions

The exception to this is visual impairments that are capable of being corrected by spectacles or contact lenses.

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4 Rights and remedies

4.1 Introduction

In addition to providing protection for those employees who have a disability themselves, the EqA provides rights for people not to be directly discriminated against or harassed because they have an association with a disabled person. This can apply to a carer or parent of a disabled person. In addition, people must not be directly discriminated against or harassed because they are wrongly perceived to be disabled.

4.2 Right not to suffer unlawful discrimination

Discrimination arises where an employer discriminates against a disabled employee because of something arising in consequence of his disability and unjustifiably treats him less favourably than he treats or would treat others to whom the reason does not apply.

The Act says that it is unlawful for an employer to discriminate against a disabled person whom he employs in the following ways:

- in the terms of employment which he affords him;
- in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit;
- by refusing to afford him, or deliberately not affording him, any such opportunity;
- by dismissing him, or subjecting him to any other detriment.

4.3 Reasonable adjustments

As part of the protection, employers may have to make reasonable adjustments if their employment arrangements place disabled people at a substantial disadvantage compared with non-disabled people. These provisions replace the quota scheme, the designated employment scheme and registration as a disabled person.

The legislation does not prevent employers from treating disabled people more favourably than those without a disability, though it does not give non-disabled people the equivalent opposite rights. For example, they are not selected during the recruitment process, because they do not have a disability.

4.4 Remedies

If a person with a disability suffers unlawful discrimination in the workplace, he can complain to the tribunal. There is no upper limit on compensation for discrimination, so an employer's unjustified discrimination or failure to make reasonable adjustments can be extremely costly.

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Example

Ms Beart was demoted after requesting to have her hours changed. She then went on sick leave with depression, never to return to work. She was dismissed and complained successfully of unfair dismissal.

She was awarded damages in the region of £400,000 by way of compensation, to reflect the fact that her ability to work and employment prospects had been badly affected by the discrimination that had taken place.

HM Prison Service v Beart [2005]

It is a general rule in the discrimination legislation that people who have been discriminated against can claim compensation for the losses they suffer as a result of the discrimination, without having to satisfy an additional test that the losses were reasonably foreseeable. So, for example, in Essa v Laing Ltd [2004] Mr Essa's compensation was not limited to that which was reasonably foreseeable. Although Mr Essa's case involved the consequences of racial discrimination, the same principle would apply to a case of disability discrimination.

Example

Mr Essa was a black Welshman, born and brought up in Wales with an interest in amateur boxing. He had represented his country many times in amateur championships.

During the summer of 1999 he worked as a labourer at the construction site of the Millennium Stadium in Cardiff. During a discussion about the allocation of work he was racially abused by P, an employee of Laing Ltd. In consequence, Mr Essa left his job. He suffered from severe depression following the incident. He was unable to look for other work and lost interest in boxing.

The tribunal computed the compensation on the basis that the employers are only liable for such reasonably foreseeable loss as was directly caused by the discriminating act. Although it was reasonable to expect Laing to have foreseen that Mr Essa would experience some distress because of the abuse from P 'they could not have reasonably foreseen the extent of Mr Essa's reaction to it'.

They added that they found Mr Essa's reaction to the abuse to be 'so extreme as to have been irrational' and decided that Laing were only liable to pay compensation for injury to feelings and three weeks' loss of earnings, as that was the length of his contract for work at the Millennium Stadium. He was awarded £5,000 for injury to feelings and just over £500 for financial loss.

The Court of Appeal disagreed with this approach and found that people who have been discriminated against can claim compensation for the losses they suffer as a result of the discrimination, without having to satisfy an additional test that the losses were reasonably foreseeable. Mr Essa's compensation was increased significantly to take his actual losses into account.

Essa v Laing Ltd [2004]

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5 Discrimination in employment

5.1 Introduction

Discrimination arises where an employer discriminates against a disabled employee because of something arising in consequence of his disability and unjustifiably treats him less favourably than he treats or would treat others to whom the reason does not apply.

5.2 Comparators

The test was established by the EAT in the 1999 case of Clark v Novacold. The Court decided that the relevant comparator in this case would be a person who has not been absent from work and who would not have been dismissed, rather than a person who has been absent from work but does not have the disability.

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Example

Mr Clark was dismissed after an injury to his back prevented him from going to work. The tribunal found that Mr Clark was disabled and that he was dismissed for a reason related to that disability.

The employer argued that they would dismiss any employee who was unable to perform his work because of ill health. Therefore, Mr Clark had not been treated less favourably for a reason related to his disability.

The Court of Appeal disagreed with this argument and said that the correct approach would be to compare Mr Clark's treatment with the treatment of others to whom that reason does not apply. The correct comparator in this case would be someone who has not been absent from work and who would not have been dismissed.

Clark v TDG Ltd t/a Novacold [1999]

In 2008 in LB Lewisham v Malcolm the House of Lords overturned the *Clark* decision. The Lords considered the appropriate comparator with whom a person suffering from a disability should be compared for the purposes of deciding whether there had been unlawful discrimination.

Malcolm was not an employment case, but its effect was inevitably felt in the workplace. The effect of the decision would be in a case of absence for reasons of ill health, that the comparison should be with a person who was not fit, but not disabled. Inevitably, the *Malcolm* decision made it more difficult for disabled employees to make successful claims.

The EqA reversed the Malcolm decision. From 1 October 2010 the position is simply that 'A person (A) discriminates against a disabled person (B) if (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim'. The result is a special category of 'disability-related discrimination', essentially unjustified less favourable treatment for a reason which relates to a person's disability with no requirement for a comparator. So the law has effectively returned to the test set out in Clark v Novacold.

An employer should therefore not discriminate in relation, for example, to the following: terms and conditions of service, arrangements made for induction, arrangements made for employees who become disabled (or who have a disability which worsens), opportunities for promotion, transfer, training or receiving any other benefit, or refusal of such opportunities, pensions, dismissal or any detriment.

Protection against unlawful discrimination starts at the selection stage, in other words before employment, continues all the way through employment and continues even after the termination of employment (for example, with regard to references).

5.3 Victimisation

Victimisation arises where a person has made an earlier "complaint" of unlawful discrimination and subsequently – and as a result of that complaint – suffers some form of less favourable treatment.

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5.4 Direct discrimination

The EqA amended the definition of disability discrimination. It now refers to a 'detriment arising from disability', which replaced 'disability related discrimination'.

The test for justifying this will be more stringent and employers will have to show that any detriment (for example a dismissal) was a proportionate means of achieving a legitimate aim.

5.5 Indirect discrimination

The definition of indirect discrimination is application of a provision, criterion or practice in relation to a protected characteristic (in this case disability) that is disadvantageous to a particular group because a considerably smaller proportion of that group is able to comply with it and it is not a proportionate way of achieving a legitimate aim.

5.6 Harassment

An employer is responsible for acts of harassment by employees in the course of their employment unless the employer took such steps as were reasonable and practicable to prevent it. As a minimum first step, harassment because of disability should be made a disciplinary matter and staff should be made aware that it will be taken seriously.

Harassment is defined as follows:

A disabled person is subject to harassment where, for a reason related to the disability, another person engages in unwanted language or conduct which has the purpose or effect of either violating the disabled person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment

It is important to note that such claims will be viewed objectively so that they are assessed to be reasonable and appropriate in respect of their individual circumstances.

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Example

Mr Jenkins had been employed by Legoland for a number of years. He had become an 'attractions team leader'. Following a motorbike accident, his left arm was withered, and required the use of a sling.

Legoland operated a long-service award scheme, whereby employees with three years' service were given personalised models to mark their service. Mr Jenkins was one of 58 employees presented with such a model at the first award ceremony. Of the 58 employees receiving awards, all but three employees received models which represented their jobs in some way, Mr Jenkins and two HR employees being the exceptions. The two HR employees were presented as a 'pregnant female model with dark hair' and 'a tall dark-haired female model with glasses', respectively. The model of Mr Jenkins comprised a man in blue with his right arm in a sling, and was the only model that showed unhappy and other-than-normal features. The model also incorrectly showed the right arm in a sling rather than the left arm.

Shortly after the award ceremony, Mr Jenkins went off sick and did not return. His consultant psychiatrist concluding that he '…is suffering from a depressive episode triggered by an insensitive experience at his place of work'. Mr Jenkins complained of disability discrimination to the employment tribunal.

The case eventually came before the EAT who considered whether or not the failure to identify the model of Mr Jenkins in a work-related environment, thereby highlighting his disability, was an act of discrimination on the grounds of his disability.

It was agreed that a detriment exists if a reasonable employee would or might take the view that the treatment accorded to him had been in all the circumstances to his detriment; an employer discriminates against a disabled employee if it treats that employee less favourably than it would treat an employee who is not disabled for a reason which relates to that person's disability; and treating a disabled employee in a different way to other employees in relation to a long service award was, in the appropriate circumstances, capable of being a detriment

The EAT assessed the evidence which had been before the tribunal. All but three of the 58 models in question showed the recipient in a workplace context. In few of those cases, however, did the element relating to the hree other members of the attractions team tively. Similarly, all four of servations and beverage personnel h received a

e, it was impossible to r Jenkins's :'… the only avail le n is that odel could be ma is not have been re a finding, to the effect that lack of work-functions, rather than to his disability, was unsustainable.

Whether or not Mr Jenkins had been subjected to a detriment, and discriminated against by this difference in treatment, had to be answered by reference to the perception that a reasonable employee would, or might, take of the treatment accorded to him. In the court's view, a reasonable employee in well have taken the view that he had been subjected to a detriment by the w from his colleagues at a substantial presentation ceremony to be identified by a (wrongly characterised) disability. The EAT upheld Mr Jenkins's appeal, finding that he had suffered disability discrimination.

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Note that a person who knowingly helps another to do something made unlawful by the Act will also be treated as having done the same kind of unlawful act. For example, a recruitment consultant engaged by an engineering company refuses to consider a disabled applicant for a vacancy, because the employer has told the consultant that he does not want the post filled by someone who is 'handicapped'. The consultant could be liable for aiding the company.

5.7 Associative discrimination

Associative discrimination may arise where a person is treated less favourably because of an association with another person who has a protected characteristic under the EqA (other than marriage and civil partnership, and pregnancy and maternity). The person who brings an employment tribunal claim would not have the protected characteristic himself. Associative discrimination is limited to claims of direct discrimination and harassment.

Example

A woman who is not promoted because she has a disabled child and her employer thinks that she could not devote sufficient time to increased duties could bring a direct disability discrimination claim in an employment tribunal.

The Disability Discrimination Act 1995 only protected those who themselves are disabled within the meaning of its provisions. In 2008 the European Court of Justice was asked to rule on the issue of whether or not the Directive affords protection to individuals who are not themselves disabled but are associated with an individual who is. The ECJ ruled that it does.

Example

Sharon Coleman was employed as a legal secretary by EBR Attridge Law LLP, a firm of solicitors. Ms Coleman is not disabled, but her son is. She is the principal carer for her son. She resigned in response to her employer's alleged discrimination against her on account of her son's disability and complained of unfair constructive dismissal and unlawful disability discrimination to an employment tribunal. The tribunal referred the question of whether or not associative discrimination contravenes the Directive to the ECJ.

The ECJ acknowledged that the Directive makes no express reference to associative discrimination, and that its specific provisions appear to be directed only at cases where the claimant is disabled. However, it held that the Directive seeks to combat all forms of discrimination on the grounds of disability and that its objectives and effectiveness would be undermined if a person subject to discrimination on the grounds of the disability of another person were excluded from protection. The Directive should not be interpreted as applying only to disabled people.

Coleman v Attridge Law [2008]

The Equality Act enshrines the principle that employees have the right not to be treated less favourably because of their association with a person with a protected characteristic such as a disability.

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One change is likely to be particularly relevant in the context of alleged associative discrimination against an employee who is a carer of a small child, albeit perhaps not in very many cases. A child aged under the age of six will qualify as suffering from a disability regardless of whether his disability affects his normal day to day activities, provided that he satisfies the other conditions required to qualify.

5.8 Perceptive discrimination

This is treating someone less favourably because it is perceived that he has a protected characteristic, whether or not he does.. For example, this may extend to treating someone less favourably because it is perceived that a person is a Muslim when in fact he is Hindu.

The concept of discrimination by perception already applied to race, religion or belief and sexual orientation. It has now been extended to cover disability as well as the other protected characteristics.

5.9 Third party harassment

The Equality Act extends the liability of employers for harassment of their employees by third parties e.g. clients, customers, suppliers and consultants. The obligation will not be triggered unless the employer knows that the employee has been harassed by a third party in the course of his employment on at least two previous occasions – not necessarily by the same third party - and the employer has not taken reasonably practicable steps to prevent the harassment on that occasion. This is otherwise known as the 'three strikes' provision.

Example

Mr Norouzi is Iranian. He worked as a residential social worker at a children's home. One of the children was regularly offensive to Mr Norouzi. In June 2008 Mr Norouzi went on long-term sick leave. He subsequently brought claims for race discrimination and racial harassment against the council.

Mr Norouzi argued that there were four discriminatory practices that placed him and other non-British staff at a particular disadvantage. These included letting racist behaviour persist by not investigating, letting racist behaviour persist by not adequately challenging, letting racist behaviour by residents become normal behaviour and not having support mechanisms in place for employees who were victims of repetitive racist abuse and harassment by residents.

Mr Norouzi sought to rely on the Race Directive because part of his claim could not succeed under the Race Relations Act 1976 as the Council itself did not engage in the conduct and was not vicariously liable under that Act. Mr Norouzi could do so under the doctrine of direct effect as the Council was a public sector employer.

The Tribunal found in favour of Mr Norouzi, finding both indirect discrimination and harassment. Essentially, the Tribunal found that the Council did not do enough to protect Mr Norouzi. In particular, the court found that it did not intervene sufficiently following an incident in December 2007, that it did not act proactively (after a February 2008 report identified the child racially abusing Mr Norouzi as an issue) and that it did not do enough after Mr Norouzi raised the issue of the racial abuse at a meeting on 7 April 2008.

Sheffield City Council v Norouzi [2010]

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In 2011, the Government indicted that this protection is unworkable and will seek to repeal it. However, at the time of writing it remains the law, and employers must take such steps as they reasonably can to protect employees who work with third parties.

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6 Collecting medical data

6.1 Introduction

One of the most contentious parts of The Equality Act 2010 is the introduction of a ban on the use of pre-employment health questionnaires except in very limited circumstances. The aim is to reduce the potential for discrimination at the application stage where it was felt that all too often unjust assessments were made based on disclosed medical conditions (especially mental health conditions) that unfairly prevented suitable applicants progressing to interview.

6.2 Pre-employment offer medical data

The general rule is that an employer cannot ask about the health of the applicant before work is actually offered, unless specific criteria are met.

Pre-employment health questions can only be asked in limited circumstances. These are set out in the Act and at least one of these must apply.

- The employer needs to establish whether the employee is fit to undergo an assessment, or whether the employer has a duty to make reasonable adjustments in connection with an assessment.

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- The employer needs to establish whether the job applicant will be able to carry out a function that is intrinsic to the job concerned.
- The employer wishes to undertake diversity monitoring.
- The employer is considering taking positive action in relation to disabled persons.
- It is a genuine requirement of the job that the employee has a particular disability.

The questions must be asked with a view to establishing whether or not the applicant will be able to carry out a function that is intrinsic to the work concerned. The explanatory notes to the Act give the example of an applicant who applies for a job in a warehouse that requires manual lifting and handling of heavy items. As manual handling is a function which is intrinsic to the job, the employer may ask the applicant questions about his health to establish whether or not he is able to do the job (with reasonable adjustments for a disabled applicant, if required). The employer would not be permitted to ask the applicant other health questions until he was offered the job.

It will also be possible to ask whether an applicant has a disability that would require reasonable adjustments to be made to the recruitment process. The example given by the explanatory notes is of an applicant who discloses a speech impairment and asks for the adjustment of more time being allowed for the interview.

If an employer asks inappropriate pre-employment questions and an unsuccessful applicant brings a direct disability discrimination claim, the onus will be on the employer to show that no discrimination took place. The Equality and Human Rights Commission may also investigate if inappropriate questions are being asked and take enforcement action.

6.3 Post-employment offer medical data

Once a job has been offered and accepted the employer may ask additional medical questions (although you will still need to take care how that information is used). If a condition is revealed that causes the candidate problems in performing the job then you must consider making reasonable adjustments. If there are no reasonable adjustments then the job offer may need to be withdrawn. There is clearly scope for claims here, so any adjustments must be very carefully considered.

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7 Reasonable adjustments

7.1 Introduction

As an employer, you are under a specific duty to make reasonable adjustments to accommodate the needs of a disabled employee. A reasonable adjustment is any step or steps that you can reasonably take to ensure that existing workplace arrangements don't put the disabled person at a disadvantage in comparison with a non-disabled person.

7.2 When to make reasonable adjustments

The duty applies where any physical feature of premises occupied by the employer, or any arrangements made by or on behalf of the employer, cause a substantial disadvantage to a disabled person compared with non-disabled people.

The duty not to discriminate arises during the recruitment process. This duty continues through into employment.

Example

Ms Ridout applied for a job with TC. She told the company that she was disabled and suffered from photosensitive epilepsy. She took medication for her disability and was actively involved in a range of hobbies and interests.

She was selected for interview. The room in which the interview was held had fluorescent lighting, Venetian blinds and light coloured walls, all of which might predispose someone with epilepsy to an attack. At the beginning of the interview Ms Ridout indicated that she might be put at a disadvantage by the lighting and she may need to wear sunglasses to mitigate its effect. The interview proceeded without the use of sunglasses and without further mention of her disability.

TC did not offer the position to Ms Ridout. She complained to the employment tribunal that she had suffered unlawful discrimination on grounds of disability. Her claim failed because the employers could not be expected to know that the lighting arrangements at the interview would disadvantage her. She had a very rare form of epilepsy and no reasonable employer could be expected to know, without being specifically told by the job applicant, that the arrangements which were made for the interview might disadvantage her. She would have been able to use her sunglasses if she needed to so do; in the event, she did not.

Ridout v TC Group [1998]

This means that you need to make reasonable adjustments for any prospective applicants, as well as making reasonable adjustments for an applicant who, but for his disability, would be a good match for the role.

Some examples of adjustments – by no means an exhaustive list – are given below.

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7.2.1 Making adjustments to premises

An employer might have to make structural or other physical changes: for example, widening a doorway; providing a ramp or moving furniture for a wheelchair user; relocating light switches, door handles or shelves for someone who has difficulty in reaching, or providing appropriate contrast in decor to help the safe mobility of a visually impaired person.

7.2.2 Allocating duties to another person

Some duties might be reallocated to another employee if the disabled person has difficulty in doing them because of the disability. For example, if a job occasionally involves going onto the open roof of a building, an employer might have to transfer this work away from an employee whose disability involves severe vertigo.

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7.2.3 Transferring the person to fill an existing vacancy

Example

Ms Archibald was a road sweeper for Fife Council. After surgery she suffered complications and as a result was virtually unable to walk. She was accepted as disabled for the purposes of DDA.

She retrained and applied unsuccessfully for over 100 sedentary jobs. The Council operated a competitive interviewing system. Ms Archibald was never the best candidate for the job. Eventually she was dismissed for being unable to sweep the roads. She complained that the Council had failed to make reasonable adjustments and that they should have given her a role she was able to do, even if she wasn't the best candidate for the role.

Her disability discrimination claim was unsuccessful at the employment tribunal, EAT and Court of Session, and she appealed to the House of Lords.

The Lords allowed her appeal. It was held that the terms, conditions and arrangements relating to the essential functions of her employment were 'made by the employer' within the meaning of the DDA. As a result, Ms Archibald was disadvantaged compared with staff who were not disabled, as she was at risk of dismissal. Where an employee becomes incapable of performing the duties of his job, the employer must make reasonable adjustments. In certain circumstances, this could require an employer to transfer a disabled employee to an existing post at a slightly higher grade without requiring him to undergo competitive interviewing.

A positive duty to make reasonable for the council adjustments was therefore triggered. It may have been reasonable for The Council to automatically transfer her to an existing post at a slightly higher grade, despite not necessarily being the best person for the job.

Archibald v Fife CC [2004]

This goes beyond what was previously considered a 'reasonable adjustment' under the DDA.

In some cases it may be reasonable to put a disabled employee into a role already occupied by another employee.

Example

PC Jelic was diagnosed with chronic anxiety syndrome. He had been removed from front-line duties and was assigned to a non public-facing role in 2004. The role later evolved to require contact with the public, and he was no longer considered suitable for it. Without warning, he was asked to attend a meeting to discuss his "medical retirement" which subsequently led to the decision by the Chief Constable to retire PC Jelic with an ill health pension. Following this report, the claimant's medical retirement was approved without any further consideration of what reasonable adjustments could be made.

PC Jelic raised claims for disability related discrimination and discrimination by reason of a failure to make reasonable adjustments.

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His claim for unlawful disability discrimination was upheld by an employment tribunal. It held that the employer had not complied with its duty to make reasonable adjustments, due to its "spectacular failure to consult" with the employee. Whilst it accepted that PC Jelic could not remain in his existing role, the tribunal considered that a reasonable adjustment would have been to redeploy him into a non public-facing police officer role. This would have meant swapping roles with another police constable who was carrying out a role more suited to the restricted duties of PC Jelic. Whilst this went beyond one of the examples of a reasonable adjustment set out in the legislation (of transferring to fill an existing vacancy), in the context of a "disciplined service" in which the relevant police constable could be ordered to move, it was a reasonable adjustment. An alternative would have been to offer new employment in a (civilian) staff role, following PC Jelic's medical retirement.

Chief Constable of South Yorkshire Police v Jelic [2010]

The Jelic case does not mean that employers will always have to consider swapping employees, although it could be appropriate in certain cases. It is notable that in this case, the nature of the employment meant that the employer could (and regularly did) order police officers to change roles.

7.2.4 Altering working hours

This could include allowing the disabled person to work flexible hours to enable additional breaks, allowing him to overcome fatigue arising from the disability, or changing the disabled person's hours to fit with the availability of a carer.

7.2.5 Assigning the person to a different place of work

This could mean transferring a wheelchair user's work station from an inaccessible third floor office to an accessible one on the ground floor. It could mean moving the person to other premises of the same employer, if the first building is inaccessible.

7.2.6 Allowing absence

It may be necessary to allow the person to be absent during working hours for rehabilitation, assessment or treatment. For example, if a person were to become disabled, the employer might have to allow that person more time off during work than would be allowed to non-disabled employees, enabling him to receive physiotherapy or psychoanalysis or undertake employment rehabilitation.

7.2.7 Training

It may be necessary to give the person, or arrange for him to be given, training. This might be training in the use of particular pieces of equipment unique to the disabled person, or training appropriate for all employees but which needs altering for the disabled person because of the disability. For example, all employees might need to be trained in the use of a particular machine, but an employer might have to provide slightly different or longer training for an employee with restricted hand or arm movements, or training in additional software for a visually impaired person so that he can use a computer with speech output.

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7.2.8 Acquiring or modifying equipment

An employer might have to provide special equipment, such as an adapted keyboard for a visually impaired person or someone with arthritis, or an adapted telephone for someone with a hearing impairment, or modified equipment (for example, longer handles on a machine).

There is no requirement to provide or modify equipment for personal purposes unconnected with work, such as providing a wheelchair if a person needs one in any event but does not have one. The disadvantage in such a case does not flow from the employer's arrangements or premises.

7.2.9 Modifying instructions or reference manuals

The way instruction is normally given to employees might need to be revised when telling a disabled person how to do a task. The format of instructions or manuals may need to be modified (perhaps produced in braille or on audio tape) and instructions for people with learning disabilities may need to be conveyed orally and with individual demonstration.

7.2.10 Modifying procedures for testing or assessment

This could involve ensuring that particular tests do not adversely affect people with particular types of disability. For example, a person with restricted manual dexterity might be disadvantaged by a written test, so an employer might have to give that person an oral test.

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7.2.11 Providing a reader or interpreter

In some circumstances a reasonable adjustment could involve a colleague for example, this could involve a colleague reading mail to a person with a visual impairment at particular times during the working day or, in appropriate circumstances, the hiring of a reader or sign language interpreter.

7.2.12 Providing supervision

The provision of a support worker, or help from a colleague, in appropriate circumstances, for someone whose disability leads to uncertainty or lack of confidence may be a reasonable adjustment.

7.3 Cost and reasonable adjustments

Generally, cost will not be considered by the courts as sufficient good reason for failing to make an adjustment. The Code of Practice provides us with some guidelines, described below.

7.3.1 The practicality of the step

It is more likely to be reasonable for an employer to have to take a step which is easy to take than one which is difficult.

For example, it might be impracticable for an employer who needs to appoint an employee urgently to have to wait for an adjustment to be made to an entrance. How long it might be reasonable for the employer to have to wait would depend on the circumstances. However, it might be possible to make a temporary adjustment in the meantime, such as using another, less convenient entrance.

7.3.2 Cost and disruption

If an adjustment costs little or nothing and is not disruptive, it would be reasonable unless some other factor (such as practicability or effectiveness) made it unreasonable. The costs to be taken into account include staff and other resource costs. The significance of the cost of a step may depend in part on what the employer might otherwise spend in the circumstances.

For example, it would be reasonable for an employer to have to spend at least as much on an adjustment to enable the retention of a disabled person – including any retraining – as might be spent on recruiting and training a replacement.

The significance of the cost of a step may also depend in part on the value of the employee's experience and expertise to the employer.

Examples of the factors that might be considered as relating to the value of an employee would include a variety of things.

- The amount of resources (such as training) invested in the individual by the employer.
- The employee's length of service.

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- The employee's level of skill and knowledge.
- The employee's quality of relationships with clients.
- The level of the employee's pay.

It is more likely to be reasonable for an employer to have to make an adjustment with significant costs for an employee who is likely be in the job for some time than for a temporary employee.

An employer is more likely to have to make an adjustment which might cause only minor inconvenience to other employees or the employer than one which might unavoidably prevent other employees from doing their job, or cause other significant disruption.

7.3.3 Extent of employer's financial or other resources

It is more likely to be reasonable for an employer with substantial financial resources to have to make an adjustment with a significant cost than for an employer with fewer resources. The resources in practice available to the employer as a whole should be taken into account, as well as other calls on those resources. The reasonableness of an adjustment will depend not only on the resources in practice available for the adjustment, but also on all other relevant factors (such as effectiveness and practicability).

Where the resources of the employer are spread across more than one business unit or profit centre, the calls on them should also be taken into account in assessing reasonableness.

For example, a large retailer (e.g. "Budgens") probably could not show that the limited resources for which an individual shop manager is responsible means it is not reasonable for the retailer to have to make an adjustment at that shop. Such an employer may have a number – perhaps a large number – of other disabled employees in other shops. The employer's expenditure on other adjustments, or his potential expenditure on similar adjustments for other existing disabled employees, might then be taken into account in assessing the reasonableness of having to make a new adjustment for the disabled employee in question.

It is more likely to be reasonable for an employer with a substantial number of staff to have to make certain adjustments, than for a smaller employer.

For example, it would generally be reasonable for an employer with many staff to have to make significant efforts to reallocate duties, identify a suitable alternative post or provide supervision from existing staff. It could also be reasonable for a small company covered by the Act to have to make any of these adjustments, but not if it involved disproportionate effort.

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7.3.4 The availability of financial or other resources

The availability of outside help may well be a relevant factor. For example, an employer, in recruiting a disabled person, finds that the only feasible adjustment is too costly for him alone. However, if assistance is available, perhaps from a government programme or voluntary body, it may well be reasonable for him to have to make the adjustment after all.

A disabled person is not required to contribute to the cost of a reasonable adjustment, but if a disabled person has a particular piece of special or adapted equipment which he is prepared to use for work, this might make it reasonable for the employer to have to take some other step (as well as allowing use of the equipment).

7.4 Exemption to the duty to make reasonable adjustments

The duty to make adjustments does not apply if the employer does not know, and could not be reasonably expected to know, that the person has a disability and is likely to be placed at a substantial disadvantage. This following case considered when an employer can rely on this exemption to avoid making adjustments.

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Example

Mrs Grey is dyslexic and regarded as disabled for the purposes of the legislation. She claimed that Eastern & Coastal Kent PCT failed to make reasonable adjustments for her during an interview process. In her application form, she referred to her dyslexia but said that she did not need any special arrangements to attend the interview. She did not perform well at the interview and was not offered the post. She complained that the PCT had failed to make reasonable adjustments.

The PCT argued that it did not know and "could not reasonably be expected to know" that Ms Grey was at a substantial disadvantage in comparison with the other applicants. Therefore it did not need to make reasonable adjustments for her.

The court considered the circumstances in which the exemption might apply. To be exempt from the strict duty to make reasonable adjustments, the employer must demonstrate that it:

- did not know that the disabled person has a disability; *and*
- did not know that the disabled person was likely to be at a substantial disadvantage compared with persons who are not disabled; *and*
- could not reasonably be expected to know that the disabled person had a disability; *and*
- could not reasonably be expected to know that the disabled person was likely to be placed at a substantial disadvantage in comparison with persons who are not disabled.

The EAT decided that for the exemption to make reasonable adjustments to apply, the employer must be able to satisfy each limb of the exemption because these are cumulative and not alternative requirements.

Eastern & Coastal Kent PCT v Grey [2009]

7.5 When does the duty to make reasonable adjustments stop?

Where there are no reasonable adjustments or you have exhausted all other avenues, you can consider dismissal. It's sensible to consult fully with the employee, properly consider all options, try out possible adjustments and take medical advice if appropriate. Ask the employee what other reasonable adjustments you can try. If you agree that there are no further adjustments and the evidence shows that the adjustments made so far aren't helping the employee, or the employee refuses to consider reasonable adjustments, then you will be able to dismiss.

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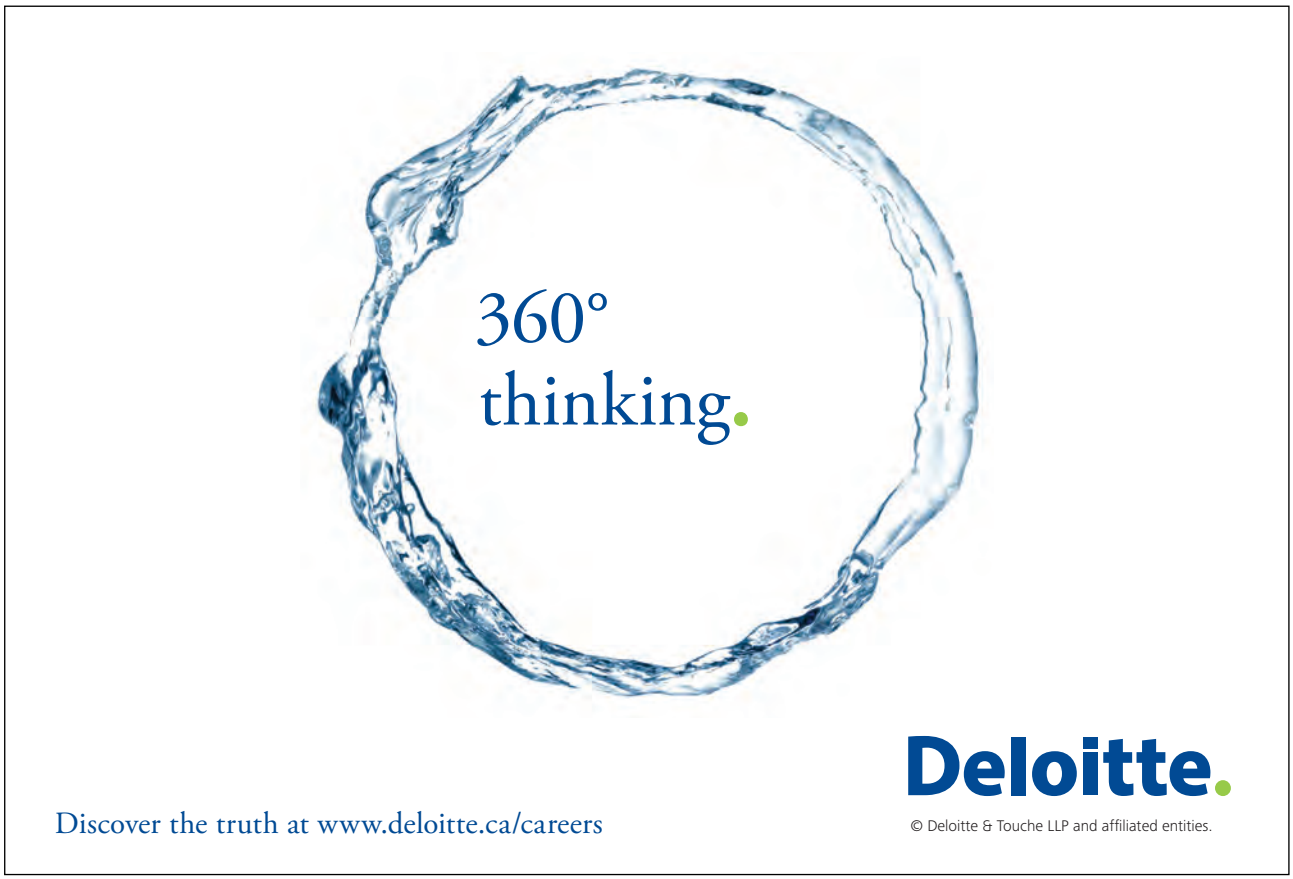
Example

One of our clients provided care workers whose role it was to travel from location to location to visit elderly or sick people at home and providing a variety of care services. These ranged from fairly light duties like preparing and serving meals, to more physically demanding jobs like the provision of personal care. The work was very mixed and it was impossible to predict from day to day and client to client how much work would be considered 'light' and how much would be considered 'not light'.

A care worker who had been employed with the company for several years had hip replacements for both hips. She made a reasonable recovery but her flexibility was impaired and she was far less able to do the heavier work. The company sought permission to write to her doctor for guidance about what she could and could not do safely and comfortably. Her GP provided a report which said that she could do general work, could drive a car, but that she could only do fairly sedentary work or very light physical duties.

The employee wanted to earn the equivalent of pay for 25 hours a week. The manager worked out how much light work the company had in the average week. It turned out to be between 10–15 hours. At a meeting with the employee, the manager provided this information to her and said that the company would be happy to give this work to her. If the employee wanted to do some office work to make up her hours, they would also train her to do that. However, it could not afford to pay her 25 hours, if she was in reality only working 10 a week. The employee refused the offer of office work and walked out. She refused to come back and discuss any further options. She complained to a tribunal, arguing that the company had constructively unfairly dismissed her and that it had refused to make reasonable adjustments.

The tribunal dismissed her claim. It was clear that the company had made an accurate assessment of the facts and was prepared to adjust her workload accordingly. There had been no failure to make reasonable adjustments.



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8 Defence

8.1 Introduction

Once it has been established that an employee has been treated less favourably for a reason arising from his disability, the court will have to consider whether the employer has a defence.

Under the Disability Discrimination Act, employers only had to show that the treatment was 'justified'. The Equality Act removes the defence of justification and will only accept less favourable treatment if it is a proportionate means of achieving a legitimate aim.

8.2 What will and will not constitute a defence

The provision requiring employers to prove that their treatment of a disabled employee was a proportionate means of achieving a legitimate aim is likely to create uncertainty until new case law has been created to give employers guidance. Until then, proceed with caution.

Less favourable treatment of a disabled person will be a proportionate means of achieving a legitimate aim only if the reason for it is both material to the circumstances of the particular case and substantial. This means that the reason has to relate to the individual circumstances in question and not just be trivial or minor. Some illustrative examples are given below.

- Someone who is blind is not short-listed for a job involving computers because the employer thinks blind people cannot use them. The employer makes no effort to look at the individual circumstances. A general assumption that blind people cannot use computers would not in itself be a material reason. It is not related to the particular circumstances.
- Someone who has psoriasis is rejected for a job involving modelling cosmetics on a part of the body which in his case is severely disfigured by the condition. That would be lawful if his appearance would be incompatible with the purpose of the work. This is a substantial reason which is clearly related – material – to the individual circumstance.

Less favourable treatment cannot be a proportionate means of achieving a legitimate aim where the employer is under a duty to make a reasonable adjustment but fails to do so. For example, an employee who uses a wheelchair is not promoted, solely because the work station for the higher post is inaccessible to wheelchairs, though it could readily be made so by rearrangement of the furniture. If the furniture had been rearranged, the reason for refusing promotion would not have applied. The refusal of promotion would therefore not be justified.

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8.3 Constructive knowledge

Note that you may be expected to know about a person's disability by putting together certain relevant facts. Ensure that, where information about disabled employees may come though different channels, there is a suitable and confidential process for bringing such information together.

Example

Ms Hall suffered from a psychiatric condition that could be controlled by medication. When she was interviewed for the position, one member of the interview panel was someone who had known her for some time. She did not specifically disclose her condition to the DWP and declined to provide any information about her long-term condition in her health declaration form. She also refused permission for the DWP to contact her doctor.

Shortly after starting work, Ms Hall was involved in arguments with other members of staff after which she was issued with an oral warning for misconduct, and informed that disciplinary action would be taken if she failed to maintain required standards of conduct. She subsequently applied for a disabled person's tax credit from the Inland Revenue and presented the application form to her manager who passed it on to DWP's HR department.

As a result of later incidents (both verbal and physical) between Ms Hall and other members of staff, Ms Hall was suspended and dismissed following a disciplinary hearing. The reason given for the dismissal was that she had failed to comply with departmental standards of behaviour by repeatedly refusing to comply with reasonable management requests and acting in a 'rude and threatening' manner. Her appeal against dismissal was rejected.

Ms Hall complained successfully to an employment tribunal that she had suffered disability discrimination and that the DWP had failed to make reasonable adjustments. Her claim was upheld and the court said that the DWP had constructive knowledge of her psychiatric condition for the following reasons:

- Ms Hall's negative replies in the health declaration form and refusal of access to her GP or medical records, coupled with her volatile behaviour, should have been a 'warning sign' to the DWP
- A member of the interview panel knew Ms Hall but did not mention anything about her health or disability
- No further enquiries had been made following Ms Hall's application for disability tax credit.

Department for Work and Pensions v Hall [2005]

In the following case, the court found the employer's actions were justified.

Example

Mr Callaghan had repeated and long-term absences from work owing to depression. His employers made every effort to deal with his absences and to enable him to return to work. Mr Callaghan failed to co-operate with the employer's efforts to meet with him or even to comply with their attendance policies and procedures.

Eventually the employer dismissed him. Mr Callaghan complained of discrimination, but the court found the employer's actions were reasonable in the circumstances and could be justified.

Callaghan v Glasgow City Council [2001]

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8.4 No reasonable adjustments

If there are no reasonable adjustments that can be made, an employer will be justified in refusing to employ or dismissing. For example, if an employee applies for a job driving a bus, he will be required to pass a medical examination to establish his fitness. If a prospective driver applies, but he is only sighted on one eye, he will not meet the requirements of the medical which stipulates certain statutory criteria. There are no adjustments that can be made in that case.

Example

Dr Louise Tarbuck was employed by Sainsbury's as a business analyst and IT project manager for Sainsbury's. She suffered from ulcerative colitis and depression. She submitted claims for disability and sex discrimination, which were settled by way of a settlement agreement in October 2002, which provided for Sainsbury's to facilitate Dr Tarbuck's return to work from March 2003.

In June 2003, Dr Tarbuck was informed she was at risk of redundancy. At risk employees were given priority when applying for internal vacancies. She appealed against her "at risk" status, claiming it unfairly disadvantaged her and prevented her return to work post-rehabilitation. Sainsbury's subsequently removed it which meant she was no longer given priority when applying for internal vacancies. Her subsequent application for a project manager role in Finance Systems was unsuccessful

Subsequently, she was placed formally "at risk" of redundancy a second time. She then commenced a period of sick leave lasting until her employment terminated by reason of redundancy on 2 February 2004. One of the central issues in Dr Tarbuck's disability discrimination claim was whether Sainsbury's had failed to make a reasonable adjustment by failing to consult with her over alternative employment. The employment tribunal found that it had.

The case went to the EAT which upheld a point raised by Sainsbury's and ruled that Sainsbury's failure to consult with Dr Tarbuck did not of itself a breach of the duty to make reasonable adjustments.

Tarbuck v Sainsbury's Supermarkets Ltd [2006]

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9 Tips to avoid disability discrimination

9.1 Introduction

There may be several ways to avoid discrimination in any one situation. Examples are illustrative only, to indicate what should or should not be done in those and other broadly similar types of situations. They cannot cover every possibility, so it is important to consider carefully how the guidance applies in any specific circumstances. Many ways of avoiding discrimination will cost little or nothing.

9.2 Don't make assumptions

It will probably be helpful to talk to each disabled person about what the real effects of the disability might be or what might help. There is less chance of a dispute where the person is involved from the start. Such discussions should not, of course, be conducted in a way which would itself give the disabled person any reason to believe that he was being discriminated against.

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9.3 Consider whether expert advice is needed

It is possible to avoid discrimination using personal, or in-house, knowledge and expertise, particularly if the views of the disabled person are sought. The Act does not oblige anyone to get expert advice, but it could help in some circumstances to seek independent advice on the extent of a disabled person's capabilities. This might be particularly appropriate where a person is newly disabled or the effects of someone's disability become more marked. It may also help to get advice on what might be done to change premises or working arrangements, especially if discussions with the disabled person do not lead to a satisfactory solution.

9.4 Plan ahead

Although the Act does not require an employer to make changes in anticipation of ever having a disabled applicant or employee, nevertheless when planning for change it could be cost-effective to consider the needs of a range of possible future disabled employees and applicants. There may be helpful improvements that could be built into plans. For example, a new telecommunications system might be made accessible to deaf people, even if there are currently no deaf employees.

9.5 Codes of practice

The Government and the Commission for Equality and Human Rights have produced a number of codes of practice, explaining legal rights and requirements. These codes are practical guidance – particularly for disabled people, employers, service providers and education institutions – rather than definitive statements of the law. However, courts and tribunals must take them into account.

9.6 Keep records

Make sure that you keep records of all conversations relating to reasonable adjustments. This should include any matters you have discussed and agreed upon.

But it should also include discussions where the outcome is a decision that you can't go ahead with certain adjustments; refusals by the employee to try out reasonable adjustments (it's not uncommon for workers who are struggling to come to work to refuse to try part time working for a period of time to see if they can cope with that) or other disagreements.

Always write to the employee to confirm the discussions and outcomes.